

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
SHATSKY, et al., : Docket #18cv12355  
Plaintiffs, :  
- against - :  
THE PALESTINIAN LIBERATION :  
ORGANIZATION, et al., : New York, New York  
Defendants. : November 6, 2020  
----- :

PROCEEDINGS BEFORE  
THE HONORABLE MARY KAY VYSKOCIL,  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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THE COURT: I'm sorry, go ahead.

ATTORNEY FOR PLAINTIFF: That's okay. We filed a protective action here, this action, so that we'd have -

THE COURT: Let me just stop you right there. What does that mean, a protective action, and how's that not abusive of the judicial process?

ATTORNEY FOR PLAINTIFF: So the reason it's not abusive of the judicial process is we filed the case in the event that the D.C. action was dismissed for lack of personal jurisdiction, recognizing the plaintiffs, or that the defendants had raised a personal jurisdiction defense and recognizing the possibility that the statute of limitations could expire and we could find ourselves in a, you know, unable to establish personal jurisdiction after the dismissal of the proceeding in D.C., we filed a protective action, this action in front of this court and stated so that in the event that the D.C. proceedings were dismissed for a lack of personal jurisdiction, we would have a timely action to fall back on. It was never the intention --

THE COURT: I understand what you're saying, but, frankly, I mean, you know, the court is not really here to provide guarantees for your strategic decisions. But we are where we are. I mean I don't understand why

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you could not have, you know, the jurisdiction you're asserting here, just like D.C., is not dependent on any fact-based connection to the jurisdiction the way you would normally be arguing in terms of a personal jurisdiction analysis. It's predicated upon a federal, federally enacted statute.

So if you can get jurisdiction here, you could've gotten jurisdiction there once the statute was passed. Now, I understand the statute postdates the filing of your lawsuit, but did you move for leave to amend?

ATTORNEY FOR PLAINTIFF: In front of the D.C., in front of the D.C. district court, we did not move for, we did not for leave. If the question is did we move for a leave to amend to assert the PSJVTA as a ground for personal jurisdiction, no, we didn't because the statute wasn't enacted until after the D.C. district court had already granted summary judgment.

THE COURT: But you were then in the district court, I mean in the circuit court. Did you ask there?

ATTORNEY FOR PLAINTIFF: I don't believe a request was made in front of the - I mean I know the questions around the PSJVTA were raised in front of the D.C. circuit, and it was actually the defendants' position

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that if there were going to be issues around the application of the PSJVTA, that those questions should be litigated before this court in this action rather than in the D.C. action.

THE COURT: I did see that. I can see that is in correspondence that the defendant sent to the clerk of the circuit court. So let me ask you, is your claim here, does your complaint reference the PSJVTA?

ATTORNEY FOR PLAINTIFF: It does not, although the PSJVTA, as far as we're concerned here, is not the substantive cause of action, but here leaves a vehicle for establishing personal jurisdiction over the defendants, and there are plenty --

THE COURT: Right, I understand that.

ATTORNEY FOR PLAINTIFF: Oh, sure. Okay.

THE COURT: I understand that, but in the first instance a complaint on its face has to plead a basis for jurisdiction, and you're telling me you've only pled the same statute that the D.C. circuit found was not sufficient to confer jurisdiction, correct?

ATTORNEY FOR PLAINTIFF: Well, no, actually the D.C. circuit never found that the PSJVTA was insufficient to establish jurisdiction.

THE COURT: Oh, it found that the original

1 PROCEEDING 6

2 statute, which is all you've pled here, was insufficient.

3 ATTORNEY FOR PLAINTIFF: That's correct, Your  
4 Honor, so what we're --

5 THE COURT: Right.

6 ATTORNEY FOR PLAINTIFF: -- what we're - but  
7 there are sort of two points, if I may, Your Honor. I  
8 don't mean to talk over the Court.

9 THE COURT: It's all right. I understand the  
10 difficulty with telephonic hearings.

11 ATTORNEY FOR PLAINTIFF: I'm so sorry. So the  
12 point is that there are two aspects of jurisdiction here.  
13 One is personal jurisdiction; the other is subject matter  
14 jurisdiction. Of course, there's no question that subject  
15 matter jurisdiction must be alleged in the complaint, and  
16 we've done that. Personal jurisdiction, on the other  
17 hand, is not required to be pled because that is a, and  
18 courts have said it, because that's a waivable defense. I  
19 mean I suppose it's possible, I don't think it's likely,  
20 but it's possible that the defendants could decide that  
21 they don't want to assert personal jurisdiction as a  
22 defense and that they didn't want to do that, the case  
23 could proceed.

24 So, you know, courts have held that personal  
25 jurisdiction need not, you know, the basis for personal

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jurisdiction and facts relating to personal jurisdiction need not be pled in the complaint. We can amend our complaint to do that if the Court thinks we need to, but I think the law is that we don't have to do that.

THE COURT: All right, I understand your position. Let me just ask you one more question though, do you specifically - I'm trying to pull up your original complaint. I don't have it right in front of me. Do you specifically reference the anti-terrorism statute, the earlier statute?

ATTORNEY FOR DEFENDANT: Oh, yes. We specifically reference the anti-terrorism act. The claims, the complaint includes claims asserted under the anti-terrorism act. And the original complaint - yes, that's right, Your Honor, and actually the complaint also includes allegations of conduct that if the conduct had occurred after the trigger dates, in the promoting security and justice for victims of terrorism act, would be a basis for concluding that there had been a consent.

So the only question really is, and it's kind of astonishing that in their correspondence the defendants haven't addressed it because everybody knows that that's the issue here, are they still doing it? Are they still

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1 making these pay-to-slay payments to individuals who've  
2 been convicted of crimes relating to terrorist acts that  
3 killed Americans or who died in terrorist acts that  
4 resulted in the death of Americans? Or, you know, have  
5 they engaged in other conduct that, you know, in the  
6 United States that under the statute would trigger a  
7 consent to personal jurisdiction?

8  
9 THE COURT: Right, I understand that, and  
10 that's why you want to take jurisdictional discovery,  
11 right?

12 ATTORNEY FOR PLAINTIFF: Precisely, we want - I  
13 mean, look, we think we can make an excellent start toward  
14 establishing personal jurisdiction. Maybe we can even use  
15 public source information to prove it, but if the  
16 defendants are denying that they've engaged in conduct  
17 that would trigger jurisdiction under the statute, we  
18 would like an opportunity to conduct targeted discovery so  
19 that we can prove it to the Court.

20 THE COURT: All right, so the question I have  
21 for you is, given that you did reference the earlier  
22 statute, isn't it for the sake of good order better for  
23 your complaint to now reference the statute on which you  
24 are trying to rely?

25 ATTORNEY FOR PLAINTIFF: If the Court thinks



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2 it's necessary, we don't actually think it's necessary to  
3 do, but if the Court believes it would be helpful or  
4 appropriate for us to do that, we could certainly amend  
5 our complaint to include allegations relating to the  
6 current statute.

7 THE COURT: All right, anything else you want  
8 to tell me at this point?

9 ATTORNEY FOR PLAINTIFF: I suppose the only  
10 thing I would add is that if we are going to, you know,  
11 we are going to conduct the jurisdictional discovery  
12 which we've requested, we think the sensible thing to do  
13 would be to have that discovery take place in, you know,  
14 in a sort of targeted way in a defined period of time  
15 before the briefing of motions to dismiss just so that the  
16 issues can be addressed one time instead of more than one  
17 time.

18 THE COURT: I understand. How long are you  
19 telling me you need?

20 ATTORNEY FOR PLAINTIFF: So we could actually  
21 issue discovery requests relating to, you know, relating  
22 to the issues that the PSJVTa raises next week, and we  
23 could serve interrogatories, we could serve document  
24 requests, and maybe we could serve some deposition notices  
25 promptly. The question will be how long it takes the

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defendants to comply with these requests. As I understand it, you know, there is actually with respect to these pay-to-slay payment there actually is, you know, there actually is sort of a well-defined process that the Palestinian Authority can establish. They maintain files and records on individuals who engage in these acts of terrorism and who are entitled to receive these, you know, are entitled to receive these payments. So the records exist, they've been produced in other litigation by these defendants, so there's actually no reason that the documents couldn't be produced to us relatively promptly if we get reasonable cooperation.

So ordinarily in a situation like this, I say we probably need, you know, 60 or 90 days to get the documents and do the discovery, but a lot of it is going to depend on how much, you know, how much cooperation we get from the defendants. So we also have the added complication of COVID-19 here.

So my sense is, you know, we would probably want to have, because I assume as well that the documents are going to be foreign language documents, we would probably want to have the documents and then have 60 days after we receive the documents to get them translated, digest them, understand our position, and - oh, I'm sorry.

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2 THE COURT: I'm going to interrupt you. You  
3 are talking about asking me to put a 2018 case which is an  
4 old case in the Southern District, reportable by me as a  
5 stale old case, you're asking me basically to put it on  
6 hold for another six months while you conduct discovery?  
7 I mean why didn't you serve this discovery over the  
8 summer?

9 ATTORNEY FOR PLAINTIFF: Your Honor, we're not  
10 entitled to serve discovery in this case until there's  
11 been a 26(f) conference and waiting until the Court  
12 otherwise authorizes. The defendants asked for time to  
13 respond, we gave it to them as a courtesy, there hasn't  
14 been a 26(f) conference, and we've --

15 THE COURT: Why not --

16 ATTORNEY FOR PLAINTIFF: -- made our request  
17 for jurisdiction discovery.

18 THE COURT: Why not? Discovery under the  
19 federal rules is self-effectuating. You do not need to  
20 come to the court to ask to have a 26(f) conference.  
21 You're supposed to do that as responsible professionals on  
22 your own, and you're supposed to exchange initial  
23 disclosures promptly. So you're basically telling me  
24 nothing has happened in this case. Is that correct?

25 ATTORNEY FOR PLAINTIFF: Your Honor, as I said,

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we, you know, when the D.C. circuit ruled and after a determination was made with respect to whether there would be a petition for cert in that case, we reached out to the defendants, we made service. You know, the defendants asked for some time to respond which we granted them, and as soon as they responded, as soon as they put their letter in, we respond, you know, we put our request in for discovery the same day.

THE COURT: And by response do you mean respond to the complaint or that hasn't happened yet?

ATTORNEY FOR PLAINTIFF: No, no, they put their response to the complaint, I mean they filed a letter with the court which Your Honor has, and it's on for a conference today, asking for permission to make a motion to dismiss.

THE COURT: Okay. All right, let me hear from the defendants.

MR. MITCHELL BERGER: Good morning, Your Honor, it's Mitchell Berger. If I may, I'd like to address your summary of past proceedings which I think are going to be relevant and then ask, respond to your question about what we've been doing and then talk about what we would like to do going forward, and all of this requires some context, which is the original --

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THE COURT: Counsel. So excuse me. Let me just say please bear in mind I have read both opinions out of D.C., I've read all the letters. I am fairly familiar, and we've been at this for almost a half hour. I appreciate you haven't spoken yet, but I don't want a total rehash of what you've said in your letters and of what happened in D.C. All right?

MR. BERGER: Totally understand, Your Honor. You had asked us to correct the Court if we had any disagreement about the past history of this case, and one of those has to do with Your Honor's summary about whether there was a request for jurisdiction discovery in D.C., and on that point I simply wanted to let the Court know that didn't happen in D.C. Next point is there have been three of these lawsuits of which this is only one.

THE COURT: Counsel, slow down so I can ask you questions if I have them. All right? Isn't it a fact that that there was no jurisdiction discovery in D.C. because your clients, I don't know whether it was you or, who was representing the defendants in D.C. as well, but wasn't there a letter to the court in D.C. saying, I think it was to the circuit court and maybe even to the clerk of the court, saying that the jurisdictional discovery under this new PSJVT, which the circuit had suggested might

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provide an avenue for jurisdiction, you represented to the court in a letter dated December 30, 2019 that that discovery might more appropriately happen, the best vehicle for plaintiffs to advance their PSJVTA arguments are the two pending duplicative actions in New York, one of which is this case. Correct?

MR. BERGER: All but the last part. The other duplicative case was pending in D.C., and it was not clear to us, Your Honor, which one the plaintiffs would chose to pursue. So they had two cases in front of Judge Leon and they had this case, as Your Honor pointed out, that was originally before Judge Woods. What happened, and to answer Your Honor's question about what we've been doing, is, first, we waited until, and they waited until their time to seek certiorari from the D.C. circuit opinion expired, and that was July. When the plaintiffs asked to then lift the stay in this case and have voluntarily dismissed the other case in D.C., we conferred and we said if you're pursuing the PSJVTA, we would like you to amend your complaint so we will know what your allegations are and we can take it forward from there. And their position at that time, which is contrary to their offer to Your Honor today, was we don't need to amend the complaint. So, therefore, we had to proceed by way of, in essence,

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shadow boxing. That is what we raised in our premotion conference letter.

Thirdly --

THE COURT: Counsel, slow down. But you did not answer my question, did you not represent to the D.C. circuit that whatever jurisdictional discovery was going to happen with respect to whether the PSJVTa created jurisdiction over your clients could better happen either in the second case in front of Judge Leon, which you're now telling me was dismissed voluntarily, or in this case in front of me? Didn't you tell that to the D.C. circuit in order to have discovery not happen there?

MR. BERGER: No, I respectfully disagree, Your Honor. I don't think that's what we said, and it relates to my point about the broader context and what's going on in two parallel cases in this district. What we said was --

(interposing)

THE COURT: -- me this letter that I just read to you dated December 30, 2019 where -- signed by -- who's speaking, by the way? I'm sorry.

MR. BERGER: This is Mitchell Berger, Your Honor.

THE COURT: All right, so Mr. Baloul said in a

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2 letter dated December 30, 2019 to Mark Langer, clerk of  
3 the D.C. circuit court, "Nor should this court remand to  
4 direct factual development of this question, the question  
5 being whether the PSJVTa could supply a new basis for  
6 personal jurisdiction." He went on to say, "Plaintiffs  
7 are pursuing these same claims through two other lawsuits  
8 filed in December 2018 as a vehicle to argue for  
9 jurisdiction on alternative bases beyond those that this  
10 court has been considering. Those alternative  
11 jurisdictional bases include a precursor to the PSJVTa,  
12 the anti-terrorism clarification act. Plaintiffs' two  
13 pending duplicative actions provide a readily available  
14 better vehicle for plaintiffs to advance their PSJVTa  
15 arguments." Now you're trying to argue the exact opposite  
16 to me here, are you not?

17 MR. BERGER: No, respectfully, Your Honor, I  
18 disagree. There are --

19 (interposing)

20 MR. BERGER: -- we talked about argument --

21 THE COURT: You're fine with discovery going  
22 forward here then?

23 MR. BERGER: No, Your Honor, and I'd like to  
24 explain why if I could.

25 THE COURT: Yeah, go ahead. I want to



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understand why the statement that I just read to you does not say what I'm understanding it to say.

MR. BERGER: Because, Your Honor, the word that your, that ended the sentence that Your Honor read and which appears earlier in that same paragraph had to do with their arguments, not facts, but with their arguments that the statute applied. The very first question that we asked for plaintiffs when we conferred with them was are you making those arguments, and their response, in essence, was we don't have to tell you, and that is why we asked them when we conferred. There are three aspects, respectfully, to whether or not the PSJVTa can supply jurisdiction. Two of those are purely legal arguments.

And we know this because the Second Circuit in the *Waldman* case, which is referenced in the next paragraph of the letter to which Your Honor referred me, is proceeding before Judge Daniels without jurisdictional discovery to take up PSJVTa arguments which includes statutory construction arguments and constitutional arguments. And the plaintiffs in the *Waldman Sokolow* case pursued or sought a jurisdictional discovery as well, and we said that that was not an appropriate way forward because the plaintiffs there likewise had not amended their complaint. Judge Daniels agreed that jurisdictional

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2 discovery should not go forward there and, in fact, set  
3 briefing to deal with the arguments, namely, statutory  
4 construction and constitutional.

5 We have a third case pending before Judge Furman  
6 called the *Fuld* case, F-U-L-D, which also raises PSJVT  
7 arguments. And what we're trying, respectfully, Your  
8 Honor, to do is to have an organized process across all  
9 three cases, *Shatsky*, *Fuld*, and *Sokolow*, to handle the  
10 PSJVT issues which we know not only does Judge Daniels  
11 have set for briefing before him, but the Second Circuit  
12 expressly directed - I know Your Honor knows this so this  
13 is in the letter that we sent - will immediately revert to  
14 the Second Circuit for an authoritative determination. So  
15 --

16 THE COURT: On the statutory construction and  
17 the constitutional issue only.

18 MR. BERGER: Well, on any issue. They told  
19 Judge Daniels to investigate all issues having to do with  
20 the applicability of the PSJVT, all issues.

21 THE COURT: (inaudible) that Judge Daniels  
22 declined to allow jurisdictional discovery and briefing on  
23 the fact-based aspect of it, correct?

24 MR. BERGER: Yes, he declined to do that, and  
25 what we have asked the plaintiffs to do, Your Honor, and

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1 this is why we think jurisdictional discovery is overkill,  
2 they don't need to prove every possible factual predicate.  
3 If they pled their factual predicates for PSJVT  
4 jurisdiction, then we would be able to determine either by  
5 way of answering the complaint or otherwise, perhaps a  
6 stipulation, if there was even any factual dispute. It is  
7 a complete overkill to allow discovery on jurisdictional  
8 issues when it's the least consequential of the three when  
9 there remain serious statutory construction and  
10 constitutional arguments that the Second Circuit has  
11 already chartered a path for how it wishes to resolve  
12 them. And if there's not going to be an interlocutory  
13 appeal of any jurisdictional determination in this case,  
14 then we run the risk of conflicting rulings.

16 So all we're seeking here, and we sought with  
17 the plaintiffs from the outset, is let's have an orderly  
18 process to deal with these issues because these issues are  
19 going to go up to the Second Circuit, and it doesn't serve  
20 either judicial efficiency or the parties' resources to  
21 have three separate courts - Your Honor, Judge Daniels,  
22 and Judge Furman in the *Fuld* case - all addressing the  
23 same issues that are going to revert immediately to the  
24 Second Circuit.

25 THE COURT: Counsel, take a pause. Take a

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2 pause. I have a question I'd like to ask. All right?  
3 You are basically - first of all, let me just ask you,  
4 before I get to the other question I want to ask, what's  
5 the status of the *Fuld* case?

6 MR. BERGER: Our motion to dismiss is due on  
7 Monday, November 9.

8 THE COURT: And you're moving on the legal  
9 grounds or are you moving on factual grounds as well?

10 MR. BERGER: Your Honor, we'll be moving on  
11 legal grounds, and we will be making an argument that I  
12 would like to make as well to Your Honor today, which is  
13 that --

14 THE COURT: Hold on, hold on.

15 MR. BERGER: I'll stop, Your Honor.

16 THE COURT: Did you tee up in front of Judge  
17 Furman the same argument that you made to me that this is  
18 all being litigated in front of Judge Daniels and we ought  
19 to have everything handled in a coordinated fashion?

20 MR. BERGER: The answer to that, Your Honor, is  
21 that will be teed up on Monday, November 9, because we  
22 originally moved to dismiss in *Fuld* back in August before  
23 the Second Circuit had set this process in motion and the  
24 plaintiffs in *Fuld* amended their complaint. Judge Furman  
25 set a schedule by which our response to the amended

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complaint is due Monday. We are going to make the argument on Monday that I am hoping to make to Your Honor today about how to handle the PSJVTA issues.

THE COURT: All right, counsel, I mean have you not made the argument? You've told me you want me to wait and see what Judge Daniels does.

MR. BERGER: No, Your Honor, I'd like to give Your Honor some legal authority that makes some sense here. I think we have three pass forward, all of which demonstrate the jurisdictional discovery would be on the one hand premature and on the other hand overkill. So I'd like to point out that if we filed a motion of the type we sought to make in our premotion conference letter which, A, challenged jurisdiction and, B, sought summary judgment based on the 18-year-old history of the first *Shatsky* case where full discovery was taken that under Federal Rule of Civil Procedure 12(i) Your Honor has the authority to defer ruling on the jurisdictional question in deference to the Second Circuit proceedings. Rule 12(i) plainly allows that type of deferral, and I'd offer Your Honor a cite to the *Kregler v. City of New York* case, 608 F. Supp. 2d 465 at 475, a Judge Marrero decision from 2009. What 12(i) is designed to do is to avoid having to deal with issues that may be complex, require further development

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2 when there's an easier merits way out of it.

3           And towards that end, Your Honor, I'd also like  
4 to offer you this proposition which was picked up in  
5 another Southern District case, Wright & Miller says the  
6 following, "When the jurisdictional question is complex or  
7 difficult, a court simply may avoid the issue by resolving  
8 the suit on the merits when they clearly must be decided  
9 in favor of the party challenging jurisdiction, thereby  
10 obviating any need to decide the question." That's quoted  
11 in a decision called *In re LIBOR-Based Financial*  
12 *Instruments Antitrust Litigation* by Judge Buchwald, 216  
13 U.S. Dist. LEXIS 51190 at pp. 112-133, n.8.

14           Our point is this, Your Honor, there's an  
15 orderly way without embarking on months of jurisdictional  
16 discovery to defer adjudication of the jurisdictional  
17 issue, to let the Second Circuit deal with it after Judge  
18 Daniels does, in the *Sokolow* case and then proceed on to  
19 the summary judgment question. That's precisely the type  
20 of, there's an easier way to resolve this without taking  
21 up the challenging jurisdictional question. There's no  
22 doubt there's a jurisdictional question under what Your  
23 Honor has called the justice for victims act. It's a  
24 challenging one. This case has been up to the Supreme  
25 Court, back to the Second Circuit, this issue rather in

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*Sokolow* has been up to the Supreme Court, back to the Second Circuit, back to Judge Daniels, and the Second Circuit said here's how we want to handle this PSJVTA issue upon remand from the Supreme Court.

And what we're seeing in all of these cases - *Fuld*, this case, and *Sokolow* - is that each of the plaintiffs is trying to pick off a different approach in each case, and what we're suggesting is there ought to be a uniform approach across all three of these cases in order to allow the Second Circuit to do the work that it first assigned to Judge Daniels. Rule 12(i) is the path that allows the court to do that consistent with the court's authority. And that --

(interposing)

THE COURT: -- counsel, a couple of points. First of all, I'm looking at Rule 12(i). Tell me what respect that supports what you've just argued to me.

MR. BERGER: Yes, Your Honor, I understand and I read 12(i) myself and I asked myself that same question which is why we researched the case law under Rule 12(i) which provides exactly the authority that I mentioned, and I can give Your Honor both the *Kregler* case that I cited and it interprets Rule 12(i) in the way that I said and the *Cooper Robertson Partners LLP v. Vale* decision, a

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Judge Robert Carter decision, 143 F. Supp. 2d 367 at 370,  
and those interpret what I agree is the otherwise opaque  
language of Rule 12(i) --

THE COURT: It's not opaque. Rule 12 talks  
about a hearing before trial.

MR. BERGER: I understand that, Your Honor, so  
let me offer you, if I may, a --

THE COURT: Counsel. Counsel, can I ask you  
the next question related to that? Even if I assume  
you're correct about this, that Rule 12(i) gives me the  
vehicle to do what you're asking me to do. You now want  
me to allow you to move for summary judgment, right, based  
on the Judge Leon opinion, correct?

MR. BERGER: On the discovery record that  
underlay Judge Leon's decision. This was a fully  
discovered case.

THE COURT: I understand, I understand. But  
the D.C. circuit vacated the Judge Leon summary judgment  
opinion. So how can there possibly be any kind of  
preclusive effect? They vacated it based on your argument  
that there was no jurisdiction in the first place, and so  
he couldn't properly grant summary judgment.

MR. BERGER: We're not arguing it for  
preclusive effect, Your Honor. What we're saying is that



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the discovery record developed over many years before Judge Leon would allow us to renew a motion for summary judgment because there is no discovery left to take. This was a fully discovered case. We're not arguing for preclusive effect; we're saying that in the alternative, given that this case, unusual among many having been around for 18 years, provides all the bases for the parties to have summary judgment proceedings even if there were jurisdiction under the PSJVT. All of that discovery is entirely admissible in this case. There's no reason --

THE COURT: Do you have the October 7 letter sent by Mr. Baloul to me?

MR. BERGER: I do, Your Honor.

THE COURT: Which argues that "even if the PSJVT supplied jurisdiction, plaintiffs' federal claims should be subject to immediate entry of summary judgment" - immediate - "based on the previously binding D.D.C. decision."

MR. BERGER: Yes, Your Honor, and after reading the plaintiffs' objection to that in their subsequent response, we had an alternative proposal to make to Your Honor, which is rather than do that, and as we said, and Your Honor will see this, on page 3 of docket number 43 which was our response to plaintiffs' letter application

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2 for jurisdictional discovery, we say in the first full  
3 paragraph on page 3 that the same discovery record taken  
4 in *Shatsky* is equally admissible in this lawsuit and  
5 compels the same conclusion that plaintiffs cannot  
6 establish causation, an element of both primary and  
7 secondary liability.

8           So our modified proposal as of our last letter  
9 to the Court is that we should be allowed, even if there  
10 were jurisdiction, to move for summary judgment based on  
11 the prior case record.

12           THE COURT: All right, I understand. I  
13 appreciate your modifying your position in response to  
14 what plaintiff pointed out.

15           MR. BERGER: And I'd like to offer, Your Honor,  
16 one additional case cite, again, because I too spent some  
17 time wrestling with Rule 12(i). But here's - Wright &  
18 Miller 5C § 1373, citing a Southern District case. It  
19 says Rule 12(i) authorizes deferral of a complex issue,  
20 and I'm quoting here, "when a related matter is pending in  
21 another tribunal." And it cites *United States v.*  
22 *Cigarette Manufacturers, sorry, Merchandizers Association,*  
23 *18 F.R.D. 497 (S.D.N.Y. 1955).*

24           That's our point. You have the PSJVTa issues  
25 pending in another tribunal. It is pending either before

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Judge Daniels in the Southern District or, given the unique terms of the remand by the Second Circuit, it will be pending in the Second Circuit, and there is no reason to duplicate that effort on the PSJVTa in this case. And when Rule 12(i) says, look, you can skip over a complicated jurisdictional issue that is pending in another tribunal and proceed to an easy merits issue, our respectful suggestion is that there's no need to go on this long detour of jurisdictional discovery when you can table the jurisdictional issue and proceed to summary judgment. If these principles anywhere, surely they apply here. This is an 18-year-old case --

(interposing)

MR. BERGER: -- that involves depositions --

THE COURT: I get all of that, and I get the path that you're proposing to me. I have other questions for you. Is your argument with respect to jurisdiction solely about personal jurisdiction or also subject matter jurisdiction?

MR. BERGER: It is solely, Your Honor, about personal jurisdiction.

THE COURT: Okay.

MR. BERGER: And, Your Honor, if I may, Your Honor asked a very important and intriguing question

1 because, as I believe Your Honor may be suggesting, the  
2 Second Circuit recently addressed this issue like in the  
3 *Butcher v. Wendt* case, came out of the Second Circuit in  
4 September, that said when jurisdiction does not involve an  
5 Article 3 subject matter jurisdiction question but  
6 involves only statutory jurisdiction which is what we have  
7 here, a new statute that purports to grant jurisdiction,  
8 the court can assume hypothetical jurisdiction and proceed  
9 to easy merits issue.

11 THE COURT: I asked you the question about  
12 subject matter versus personal, that's exactly what I'm  
13 getting at.

14 MR. BERGER: Yes, Your Honor, and we think  
15 there are many paths to that same conclusion, so one is  
16 Rule 12(i), the second is hypothetical jurisdiction. The  
17 third one, but I heard Your Honor reject it, so I'm not  
18 suggesting it, is the case could be further stayed pending  
19 *Sokolow*. But any one of the first two, 12(i) or  
20 hypothetical jurisdiction, would allow this Court to say,  
21 look, I understand the Second Circuit is dealing with this  
22 issue and going to do so in the near term and do so  
23 authoritatively, so either I'm going to defer the personal  
24 jurisdiction question and proceed to summary judgment or  
25 I'm going to assume without deciding that there's

hypothetical personal jurisdiction and proceed to summary judgment.

Your Honor, we hear you loud and clear about the age of this case, and trust me, this case against our client was filed 18 years ago, November of 2002. It is fully discovered. We're keen to say that even if there were jurisdiction, and the Second Circuit will tell us whether there is, the Court could proceed to summary judgment. If the Court doesn't want to do that, then the Court can certainly put this case on hold pending the outcome in *Sokolow*, and we're not just trying to convince Your Honor that this is the right approach. We're trying to convince, and will on Monday make our argument to Judge Furman that this is the right way forward. Because the one thing that would really in our respectful submission damage the judicial system is to have three separate district courts wrestling with the same issue.

THE COURT: I don't buy that, and I don't want to hear that. As a judge, I have an obligation to deal with issues before me, and lots of times different district judges come out differently, and that's why appellate courts exist. So that argument is just not compelling to me at all.

There are a couple of other things I'd like to

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2 explore with you both sides though. What is the schedule  
3 in *Sokolow*?

4 MR. BERGER: Your Honor, the opening brief from  
5 the plaintiffs is due, pursuant to an extension that they  
6 just requested, is due on November the 12<sup>th</sup>. Our  
7 response, pursuant to that schedule, is Due January 8, and  
8 the plaintiffs' reply is due February 9.

9 THE COURT: All right, so I mean there's no  
10 assurance you're going to have a ruling from the Second  
11 Circuit even by the end of next summer.

12 MR. BERGER: That's correct, Your Honor.

13 THE COURT: All right. And you say you have  
14 argument on Monday in front of Judge Furman.

15 MR. BERGER: No, Your Honor, we're filing our  
16 motion to dismiss on Monday the 9<sup>th</sup> in which we will be  
17 making this argument. We had previously moved to dismiss  
18 for lack of jurisdiction and under 12(b)(6) but the  
19 plaintiffs amended, so our opening brief on our motion to  
20 dismiss the amended complaint is due Monday.

21 THE COURT: So you moved on personal  
22 jurisdiction grounds?

23 MR. BERGER: We moved on personal jurisdiction  
24 because the plaintiff, including under the PSJVTa, because  
25 the plaintiffs there had personal jurisdiction allegations

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that they included in their complaint to which we responded and said the factual basis for personal jurisdiction under the PSJBTA is incorrect. It's processes like that that caused us, Your Honor, to say to the plaintiffs, look, the D.C. circuit said if you have new facts that you feel support --

THE COURT: I get it. (inaudible) rehash all that. I get it. You asked them to amend and they didn't. I get that. But can you finish telling me about the case in front of Judge Furman?

MR. BERGER: Yes, Your Honor.

THE COURT: You moved to dismiss for lack of personal jurisdiction and then they amended, is that right?

MR. BERGER: And 12(b)(6). And then they amended, that's correct, Your Honor.

THE COURT: And what did they amend to do, just add more meat on the bones of their allegations or did they assert something different?

MR. BERGER: They amended to basically, Your Honor, as the plaintiffs' letters here do, to copy the *Sokolow* allegations about PSJBTA jurisdiction, they added some minor additional factual allegations, but mostly what they did was they imported the *Sokolow* PSJBTA jurisdictional

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2 allegations.

3 THE COURT: Okay, and then you filed a new motion  
4 to dismiss or you just renewed the one you previously had  
5 made?

6 MR. BERGER: We will be filing our new motion to  
7 dismiss on Monday in which we will make the same suggestion  
8 I've made to Your Honor.

9 THE COURT: Okay. One final question about the  
10 case before Judge Furman, and then I want to hear from  
11 plaintiffs again in response to what you're proposing. You  
12 don't have any indication from him whether he's going to  
13 entertain argument, right?

14 MR. BERGER: I don't have that, Your Honor. Judge  
15 Furman, when we filed an original motion to dismiss, set kind  
16 of two prescriptive schedules. One is that the plaintiffs had  
17 X days to amend, and if they amended, then we had a choice of  
18 standing on our previous motion or refiling. We chose the  
19 refiling option. That's all that he's done so far. And he  
20 has adjourned sine die the original initial scheduling  
21 conference in that case because of the motions that were  
22 filed, and he gave us the opportunity to refile.

23 THE COURT: Are there any plaintiffs in the *Fuld*  
24 case that overlap with the plaintiffs here?

25 MR. BERGER: No, Your Honor.



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THE COURT: And what about in the case in front of Judge Daniels?

MR. BERGER: No, Your Honor. And I know you don't want me to be argumentative, but I just want to reinforce one point which is that part of our point which is there aren't case specific issues under the PSJVT. They're common across all three of these cases.

THE COURT: I understand that. I just wanted to know whether these plaintiffs, these exact groups of plaintiffs were getting three separate bites at the apple here. That's what I'm trying to get at.

MR. BERGER: Not across those three cases, Your Honor.

THE COURT: Okay. All right. Actually before I let you go, one final question, why shouldn't I grant leave to and here so that we're at least knowing what complaint we're or what allegations we're working off of?

MR. BERGER: We don't oppose that, and, in fact, we've urged them to amend.

THE COURT: Okay. All right, thank you. So let me turn back to the plaintiffs. Counsel, my reaction after listening to both of you, I was going to say patiently, maybe I wasn't so patient, but why are you not amending your complaint to be clear about what it is that you're arguing so

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that if and when we get to motion practice, everybody knows what the target is?

ATTORNEY FOR PLAINTIFF: Well, Your Honor, can I go again for the plaintiffs? We think the defendants know perfectly well what the factual issues are around jurisdiction under the PSJBTA. The questions are twofold: One, are the defendants making payments by, you know, to individuals imprisoned or killed in connection with, you know, the commission of terrorists acts in which American citizens were injured, that's number one. And number --

THE COURT: And do you --

(interposing)

THE COURT: Do you plead in your complaint that they've done that?

ATTORNEY FOR PLAINTIFF: We allege that they were doing it prior to the trigger date under the PSJBTA, and the reason that it's prior to is because - oh, go ahead.

THE COURT: That's not sufficient, right?

ATTORNEY FOR PLAINTIFF: Well, under the statute there's a trigger date, so obviously those allegations are not allegations that would result, if true would result in a consent to jurisdiction under the PSJBTA. But --

THE COURT: Right. For right now, on the basis of your pleadings, they're entitled to dismissal by your

1 admission.

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3 ATTORNEY FOR PLAINTIFF: Well, we don't agree with  
4 that, Your Honor, respectfully, because, as I said, you know,  
5 as I said earlier, a complaint is not required to allege  
6 (indiscernible) for personal jurisdiction. In the event that  
7 there is a motion to dismiss based on lack of personal  
8 jurisdiction, we would be entitled to oppose that motion not  
9 only based on the allegations in our complaint but also on the  
10 basis of other evidence that we could put in front of the  
11 Court. So I don't --

12 THE COURT: Counsel, it's cleaner for us all, for  
13 the court, for defendants, and everybody else who's going to  
14 look at this, to understand what the allegations were that  
15 they were moving to dismiss. Why are you resisting amending?

16 ATTORNEY FOR PLAINTIFF: Your Honor, we're not  
17 resisting. If the Court believes that it would be appropriate  
18 for us to amend the complaint to include specific allegations  
19 relating to facts that would trigger personal jurisdiction  
20 under the PSJVT, we're prepared to do that, although, as I  
21 said at the beginning and as I explained to Mr. Berger when we  
22 spoke earlier, when we spoke at the very beginning of all  
23 this, we just don't it's necessary under the law. But if  
24 that's something the Court wants us to do, we're, of course,  
25 prepared to do it.

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THE COURT: All right, well, counsel, I just told you what my reaction would be to a motion to dismiss the complaint that doesn't contain allegations that hits the trigger. So if you wish to amend, leave is granted, and you need to do that within two weeks.

ATTORNEY FOR PLAINTIFF: Your Honor, just under all of the circumstances, given that our clients are in Israel and that there are some logistical issues, could we have 30 days to amend our complaint?

THE COURT: No, counsel, you've been talking about this for how long. You know what the allegations are. If you run into, you know, extraordinary circumstances that you cannot overcome and you make a specific showing, you can come back to me for an extension, but right now the order is two weeks.

ATTORNEY FOR PLAINTIFF: Okay, that's fine, Your Honor. That's fine.

THE COURT: Thank you, that's the ruling.

ATTORNEY FOR PLAINTIFF: Okay. Your Honor, I don't know that Your Honor wants to hear me on this, but there are a number of points that Mr. Berger made with which I disagree relating to the impact of the proceedings before Judge Leon in this case sort of regardless of the D.C. circuit's vacate order.

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THE COURT: No, I don't really --

ATTORNEY FOR PLAINTIFF: I don't know if Your Honor  
hear us on that now, and if not, we can be heard on  
but I do have some reactions to it to share.

THE COURT: I don't need to hear it right now because it will become relevant only if and when we get to the stage where defendants are renewing their request for leave to move for summary judgment. I'm not going to grant that just yet. I'm not saying no, Mr. Berger, on the summary judgment, I'm just not prepared to entertain it just yet.

ATTORNEY FOR PLAINTIFF: Right --

MR. BERGER: Understood, Your Honor, and if I may just ask a housekeeping question then so that we don't burden you with additional letters, which is if they amend in two weeks and we wish to either proceeding by summary judgment or a motion, how would Your Honor like us to proceed? Shall we write another pre-motion conference letter? Does Your Honor want us to respond within the two weeks to an amended complaint that Rule 15 would give us? We'll do, of course, whatever the Court wants, but I want to make sure that we're not working at cross-purposes with Your Honor's direction.

THE COURT: All right, I mean to be perfectly honest, I want to go back and look at the Second Circuit decisions again, and I will enter an order with instructions

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about how we're going to proceed once we get an amended complaint.

MR. BERGER: Absolutely, Your Honor, thank you.

THE COURT: All right, is there anything else from either side that we need to talk about today then in light of what I've ordered?

MR. BERGER: Not from the defendants, Your Honor.

ATTORNEY FOR PLAINTIFF: Apart from the point I raised a moment ago which we can raise later if necessary, just a question of sort of, you know, the impact of the rulings in the D.C. litigation which we think, you know, we just disagree with the defendants' position in a lot of different ways on that point, not anything for us at the moment. I assume that, right, we'll file our amended complaint and Your Honor will proceed.

THE COURT: Right. Correct. All right, anything else at this point?

MR. BERGER: Nothing, Your Honor, thank you.

ATTORNEY FOR PLAINTIFF: Nothing for the plaintiffs, Your Honor, thanks for hearing us this morning.

THE COURT: All right, thank you both very much. Have a good rest of the day and please stay healthy and safe, everyone.

MR. BERGER: Thank you.

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ATTORNEY FOR PLAINTIFF: And you, and everybody.

THE COURT: Thank you.

ATTORNEY FOR PLAINTIFF: Thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, *Shatsky, et al. versus Palestinian Liberation Organization, et al.*, Docket #18cv12355, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: November 12, 2020